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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 180

JEAN RUCKER, as Guardian ad Litem of ROSA HILL,
a mentally incompetent person,
Petitioner,

v.

FIFTH AVENUE COACH LINES, INC. and
EDWARD DEVLIN,
Respondents.

On Petition for Writ of Certiorari to the Court of Appeals of the State of New York

BRIEF FOR RESPONDENTS IN OPPOSITION

STUART RIEDEL,
Counsel for Respondents,
116 West 32nd Street,
New York, New York 10001

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 1155

JEAN RUCKER, as Guardian ad Litem of ROSA HILL, a mentally incompetent person,

Petitioner,

v.

FIFTH AVENUE COACH LINES, INC. and EDWARD DEVLIN,

Respondents.

On Petition for Writ of Certiorari to the Court of Appeals of the State of New York

BRIEF FOR RESPONDENTS IN OPPOSITION

Jurisdiction

The alleged constitutional question which petitioner seeks to have reviewed was first raised in the state courts nearly three months after the dismissal of the complaint by the New York Court of Appeals. Petitioner at that time moved for reargument or, in the alternative, for amendment of the remittitur to recite that the constitutional question here raised had been presented and necessarily passed upon.

The reargument was denied by order dated February 11, 1965, while the remittitur was amended by a second order of February 11, 1965 (R. 1-a*), which recited that on the motion for reargument the alleged constitutional question was presented and passed upon.

Questions Presented

1. Whether the Seventh Amendment guarantee of trial by jury in suits at common law is applicable, by virtue of the due process clause of the Fourteenth Amendment, to proceedings in State Courts involving only local civil issues.

2. If so, whether in the instant case the dismissal of the complaint, upon the ground that as a matter of law the evidence failed to establish actionable negligence under the law of New York, constituted a denial of petitioner's right to a jury trial under the Federal Constitution.

Statement

The plaintiff-petitioner relied entirely on one witness to establish the circumstances and facts of the accident. This was the defendant-respondent, Edward Devlin, the operator of the bus. Although Devlin had been examined before trial and his testimony reduced to a reasonably coherent deposition, no perceptible order may be found in the conduct of his direct examination by plaintiff's counsel at trial. There is a persistent skipping about, both in time and subject matter, certainly confusing if not designed to confuse. His testimony in the main must be extracted from counsel's questions. The resulting record is difficult to read and therefore to analyze.

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* Numerals preceded by R. refer to pages in record; numerals preceded by P. refer to pages in petition for writ.

The presentation of the facts in the petition suppresses and ignores vital facts, colors and distorts others, changes words used, and resorts to partial extracts from the record and a jumbled-in-time method of presentation, with the result that although most of the facts presented are individually correct, the presentation as a whole is an obvious bid to obfuscate the factual issues of the case.

Accordingly, respondents deem it necessary to accurately and completely present the critical portions of the testimony, and to comment later on petitioner's cavalier treatment of the facts.

Devlin, the bus operator, was subpoenaed as a witness by the plaintiff (R. 41). He was queried at first about his general experience and general mode of driving under conditions usually present.

He testified he was familiar with Lexington Avenue (R. 42). The terrain is level at Lexington Avenue and 112th Street (R. 44). A white line ran down the middle of Lexington Avenue at the intersection of 112th Street (R. 42). There are generally parked cars along the curb (R. 42). There is room for an automobile to be parked on either side of the street and also for automobiles by way of moving traffic to go in each direction (R. 42). There would be very little clearance, except for the space taken up by his bus, between the white line on the left and parked cars on the right. Lexington Avenue is a narrow street (R. 43). If a person were two feet west of a car that was parked at the curb, he would very likely be in that part of the roadway on which he would be traveling (R. 43). He would generally operate his bus close to the white line and on his side of it (R. 43).

When petitioner's counsel turned to the date of the accident, Devlin testified that the accident happened at 6:30 P. M. in the evening (R. 44). It was a clear night and the street lights were on (R. 44, 53), although he does not be-

lieve that the intersection was fairly well lit (R. 53). There were parked cars on the east side of Lexington Avenue between 112th and 113th Streets (R. 50). Traffic was medium (R. 45). There was no traffic coming toward him and none ahead of him close enough to be of any concern (R. 45, 46).

He was half-way down the block between 111th and 112th Streets when he first saw the lady (R. 44, 48). He had his headlights on (R. 53). There was nothing to obstruct his vision. There was no parked car between him and the lady, nor any car traveling in front of him (R. 50). The lady was standing still (R. 54, 56) in the roadway a couple of feet beyond the line of parked cars (R. 44, 47), west of the parked cars (R. 56), and north of the north crosswalk area of 112th Street and Lexington Avenue (R. 48) at the easterly side (R. 56). The north crosswalk is a continuation of the sidewalk as if there were two white lines going across the street, although there are not actually any white lines (R. 46, 47).

She was north of the crosswalk by two feet (R. 48, 49, 56). The parked cars had their backs to him. She was south of the first car north of 112th Street; she was not past the back or further north of the back of any parked cars (R. 50). She was facing west as one would look if one were crossing from east to west (R. 46). She was a foot or so further out than the parked car that was there in the area (R. 56).

He was driving at 15 to 20 miles per hour (R. 67). He did not step on his brakes when he first saw her (R. 55). He slowed the bus down (R. 55). His later statement that he assumed he slowed the bus down was stricken (R. 55). He stated it might be so that from the time he first saw the lady until he was 10 feet from her, he did not increase or decrease his speed, he did not remember (R. 60).

When he first saw her, he blew his horn (R. 54). He saw her turn her face toward him. The lady remained standing there. She did not get out of the way (R. 55). He would clear the lady by moving the bus a little bit if she stood still (R. 68). If she stood still, his bus coming up in the general direction would not have hit her (R. 69). He might have had his wheels a few inches over the wrong side of the street before he reached within ten feet of the woman (R. 75). He was probably out further than he should have been to clear her (R. 57, 59).

The traffic lights were green for north and south at the time of the accident (R. 71).

He was almost on top of the lady, he guesses about 10 feet from her, when she started to move (R. 57, 69). The lady darted out in front of him (R. 69). She moved quickly from the front as if to cross (R. 59). He did not know she would dart out (R. 71). When he saw her dart, he swerved the bus to the left, to the west, away from the lady, and he braked it (R. 58, 69).

He went as far as he could over to the left when he swerved (R. 64); far enough over into the wrong side of the road so that at least three or four of his wheels were over there (R. 64). It would be the rear of the bus which came in contact with the lady, because that is where he heard the thump (R. 71). His bus was over on the wrong side of the road at the time he heard the noise of her body and the bus coming together (R. 64).

He got out of his bus after the woman was struck (R. 59). Her body was close to the white line—about where the white line was (R. 60).

The brakes were in good condition at the time of the accident. After the accident some police authority examined the bus. A police officer actually drove the bus, tested the brakes, and found them in good condition (R. 68).

ARGUMENT

I. The Fourteenth Amendment does not extend the right to a jury trial under the Seventh Amendment to state court proceedings involving only local civil issues.

While there has been a current of opinion that the Fourteenth Amendment was intended to make secure against state invasion all the rights, privileges and immunities protected from federal violation by the Bill of Rights

> *Chambers* v. *Florida*, 309 U. S. 227, footnote 8;
> *Gideon* v. *Wainwright*, 372 U. S. 335, 345,

this opinion has never been able to command a majority of the Court.

The Court has consistently held that the rights enumerated in the first eight amendments are not *in toto* protected against state intrusion on any theory that they are incorporated by and in the Fourteenth Amendment. Thus in *Bartkus* v. *Illinois*, 359 U. S. 121, the Court said at page 124:

> "We have held from the beginning and uniformly that the Due Process Clause of the Fourteenth Amendment does not apply to the States any of the provisions of the first eight amendments as such. The revelant historical materials • • • demonstrate conclusively that Congress and the members of the legislatures of the ratifying States did not contemplate that the Fourteenth Amendment was a short-hand incorporation of the first eight amendments making them applicable as explicit restrictions upon the States."

To the same effect, see:

> *Twining* v. *New Jersey*, 211 U. S. 78.
> *Adamson* v. *California*, 332 U. S. 46.

Such of the rights and immunities of the Bill of Rights as have been held applicable to the states are those fundamental personal rights and liberties necessarily encompassed within the conception of due process of law. And it has uniformly and continuously been held that the right of trial by jury is not such a fundamental right protected by the due process clause.

Thus, in *Walker* v. *Sauvinet,* 92 U. S. 294, the Court said at pages 92, 93:

> "A trial by jury in suits at common law pending in the State courts is not, therefore, a privilege or immunity of national citizenship, which the States are forbidden by the Fourteenth Amendment to abridge. A State cannot deprive a person of his property without due process of law; but this does not necessarily imply that all trials in the State courts affecting the property of persons must be by jury. This requirement of the Constitution is met if the trial is had according to the settled course of judicial proceedings."

In *Iowa Central Railway Co.* v. *Iowa,* 160 U. S. 389, the Court said at pages 393, 394:

> "But it is clear that the Fourteenth Amendment in no way undertakes to control the power of a state to determine by what process legal rights may be asserted or legal obligations be enforced, provided the method of procedure adopted for these purposes gives reasonable notice and affords fair opportunity to be heard before the issues are decided."
>
> * * *
>
> "It was not a denial of a right protected by the Constitution of the United States to refuse a jury trial * * *."

In *Minneapolis & St. L. R. Co.* v. *Bombolis*, 241 U. S. 211, the Court said at page 217:

> "* * * the Seventh Amendment applies only to proceedings in courts of the United States and does not in any manner whatever govern or regulate trials by jury in state courts or the standards which must be applied concerning the same * * *."

To the same effect, see:

Hawkins v. *Bleakly*, 243 U. S. 210;
Wagner Electric Mfg. Co. v. *Lyndon*, 262 U. S. 226;
Dohany v. *Rogers*, 281 U. S. 362;
Fay v. *New York*, 332 U. S. 261.

Petitioner urges (P. 9, 10) that the recent decisions of this Court in *Mapp* v. *Ohio*, 367 U. S. 643, *Robinson* v. *California*, 370 U. S. 660, *Gideon* v. *Wainwright*, 372 U. S. 335, *Malloy* v. *Hogan*, 378 U. S. 1, and *Granville* v. *Texas*, —— U. S. ——, 33 Law Week 4306, demonstrate the Court's intent to re-examine past decisions and include the guarantee of the Seventh Amendment into the due process clause of the Fourteenth Amendment, so as to make it binding upon the states.

These cases were all criminal proceedings, where personal rights, privileges and immunities had been ridden over roughshod by the states, and where it was necessary that this Court insist that such indefensible flouting of individual rights be ended.

It is a far cry from criminal proceedings where the state is an active participant to civil suits between private litigants, where the sole function of the state is to provide the forum where, and the ground rules under which, the rights of the parties may be adjudicated.

To ever hold that the Seventh Amendment guarantee of a jury trial in civil actions applies to state court proceed-

ings involving only local issues would make the woe which followed the opening of Pandora's box seem like minor mischief indeed.

The court systems of the states would be completely disrupted, since every case involving more than $20 would command a jury trial (see Seventh Amendment), juries would have to return unanimous verdicts (the common law requirement; see *Minneapolis & St. L. R. Co.* v. *Bombolis, supra*), and the state courts could not grant summary judgments, reduce excessive verdicts or set aside obviously inadequate ones, dismiss completely groundless and unproven claims, or take any other steps which might conceivably be urged to lie within the province of the jury.

In turn, this Court would be deluged with such a plethora of applications for certiorari that the processing of them would be impossible and the storage of the records would require a building larger than the Pentagon.

These are some of the compelling practical reasons why there can be no departure from the established principle set forth in *Dohany* v. *Rogers, supra*, at page 369:

> "The due process clause does not guarantee to the citizens of a state any particular form or method of state procedure. Under it he may neither claim a right to trial by jury nor a right of appeal. Its requirements are satisfied if he has reasonable notice and reasonable opportunity to be heard and to present his claim or defense, due regard being had to the nature of the proceeding and the character of the rights which may be affected by it."

II. In any event, petitioner completely failed to establish any element of liability under any applicable standard, and the complaint was properly dismissed.

The New York Court of Appeals has held that the facts established by the testimony of the bus operator (the only evidence in the entire case as to how the accident hap-

pened) failed as a matter of law to establish actionable negligence under New York law. This holding is binding upon this Court.

Erie R. Co. v. *Tompkins*, 304 U. S. 64.

Consequently, what petitioner in effect asserts is that in the absence of all evidence of actionable negligence, a jury must nevertheless be given the non-reviewable, non-reversible and inviolate power to find the existence of negligence. The mere statement of the claim suffices to show its invalidity.

But assuming, *arguendo*, that petitioner was constitutionally entitled to a jury trial and that this Court could review the evidence *ab initio*, and reach its own conclusion as to the existence of actionable negligence under a federal standard*, it is submitted that the petitioner still failed to establish any element of liability under such a standard.

1.

The bus operator's testimony, which is the only evidence in the entire case as to how the accident happened, not only completely fails to establish any negligence on the part of the defendants-respondents, but affirmatively and incontrovertibly establishes that in any event the plaintiff-petitioner was guilty of contributory negligence as a matter of law.

Devlin's testimony, briefly recapitulated, was that he was driving north on Lexington Avenue; his brakes were good, his headlights on, and his vision unobstructed; when mid-way between 111th and 112th Streets, he saw the plain-

* Even the important question as to whether in a federal court action, where jurisdiction is rested on diversity of citizenship, it is proper to apply a state or federal test of sufficiency of the evidence to support a jury verdict, has not been passed upon by this Court. See *Dick* v. *New York Life Ins. Co.*, 359 U. S. 437, 445.

tiff standing in Lexington Avenue off the curb at the northeast corner of 112th Street, about two feet north of the crosswalk, south of the first car parked north of the crosswalk, and a foot or so out beyond, i.e., west of, the line of parked cars; he sounded his horn, and the plaintiff, who was facing west, turned her face toward him, but remained standing there; he was out further than necessary to clear her, his bus would not have hit her if she stood still; when he was on top of her, about 10 feet from her, she darted out in front of him; he swerved away as far as he could and at the same time applied his brakes; the bus went over almost entirely on the wrong side of the road and he then heard a thump at the rear of the bus; afterwards she was lying close to the white center line of the street.

Clearly, no possible construction of the foregoing testimony could sustain a verdict for the plaintiff, since it not only fails to establish negligence on the part of the defendants, but establishes beyond cavil affirmative causative negligence on the part of the plaintiff.

2.

Petitioner, however, attempts in various ways to twist negligence from Devlin's story. Close scrutiny of such claims will reveal their invalidity.

(a)

Petitioner's consistent claim in the state courts was that Devlin was negligent in not having slowed down his bus or in having brought it to a halt. In line with this argument, counsel now seeks to suggest that the bus was speeding and never slowed down, since Devlin "covered as many blocks as he could with each change of lights" and "passed plenty of buses on the way" (P. 4), and since he finally, when confronted with his Motor Vehicle testimony, admitted "that he did not change his speed until he swerved the bus" (P. 6, 12, 13).

Firstly, the questions asked did not propound whether the operator was covering as many blocks as he could without regard for existing traffic regulations, nor did the answers in any way imply that he was. The direct evidence on the question is that the bus was traveling at between 15 and 20 miles per hour (R. 67), a proper and permitted speed.

Secondly, what Devlin admitted was that he had been asked and answered in the negative at the Motor Vehicle hearing a question as to whether he had changed his speed, *not from the time he first saw petitioner,* but "from the time you started to cross 112th Street" (R. 61).

Devlin testified that when he first saw the plaintiff, he blew his horn but did not step on his brakes (R. 54, 55); that he slowed the bus down (R. 55); that it might be that he did not increase or decrease his speed from the time he first saw the plaintiff until he was 10 feet from her, he did not remember (R. 60). Any suggestion that Devlin was negligent in not having slowed down his bus or in not having brought it to a halt not only proceeds on the entirely erroneous assumption that the plaintiff affirmatively proved by the foregoing testimony that the operator did not slow down the bus, but would impose a degree of care, which no reasonable man should or could be expected to exercise. The bus was traveling at no more than 15 or 20 miles per hour, well within the permitted speed; the plaintiff was standing off the curb, a foot or so further out than the line of parked cars; there was nothing behind her; when the operator blew his horn, she turned her head toward him; and the traffic lights were in favor of the bus and against the plaintiff. Under such circumstances, any requirement that a motor vehicle stop or slow down to a crawl, in anticipation of the possibility that a standing pedestrian might dart out into the path of the bus, would be ridiculous. Pedestrians, even though held from crossing by red lights or Don't Walk signs, just will not and do not stay on the sidewalk, and such a standard of care

generally imposed and observed would immobilize vehicular traffic in New York City.

As was said herein in the dissenting opinion at the Appellate Division (R. 239-241; 19 A. D. 2d 598, 240 N. Y. Supp. 2d 619), which opinion was adopted by the Court of Appeals (p. 21; 15 N. Y. 2d 516, 202 N. E. 2d 548) in reversing and dismissing the complaint:

> "* * * The claim that the driver on seeing the plaintiff standing out from the curb should have anticipated that she might at any time have proceeded into the street and hence into the path of his bus, and have slowed down, assumes a rule of conduct utterly at variance with street conditions and, if followed in practice, would undoubtedly so disrupt traffic that the streets would become well nigh unusable for vehicles. It is impossible to move about in this city without recognizing that a great number, if not the majority, of pedestrians wait for a change in the traffic light not on the sidewalk but in the roadway, at about the point where cars are parked, just as this plaintiff did. If a driver would be obliged to stop or slow down to the extent that he could stop in time, his progress would be so affected at practically every corner he approached that vehicular traffic would be impeded to an intolerable extent. Common experience shows no driver does this. Unless we wish to announce one rule for liability and another, quite different, rule for practical use, the theory of liability in this case cannot stand.
>
> "The complaint should have been dismissed."

(b)

Petitioner claims the jury could have found that the bus operator drove straight ahead in an undeviating line notwithstanding the fact that the petitioner was standing directly in his path (P. 11), and in support of such claim

asserts the operator testified that petitioner was standing two feet out beyond the parked cars (P. 6, 11, 12), that a person standing two feet out would be standing in the path of the bus (P. 11), and that he did not move the bus until petitioner was 10 feet away (P. 11, 12).

First, the operator never stated petitioner was *two* feet out from the parked cars. He simply replied in the affirmative when counsel asked if she were "a couple of feet" beyond the line of parked cars (R. 44, 47) but when the witness used his own expression, it was "a foot or so" (R. 56). Secondly, the operator did not say that in the particular situation presented at the time of the accident a person two feet out would be standing in the path of the bus, but stated, while the questions were directed to his *general* experience and *general* mode of driving under conditions *usually present,* and *before counsel even turned to the night of the accident,* that if a person were two feet out beyond a parked car, he would very likely be in that part of the roadway on which he would be traveling (R. 43). Third, Devlin never testified that he did not "move" the bus until petitioner was 10 feet away. What he did say was that he first "swerved" the bus when petitioner darted out when he was 10 feet away (R. 57). This in no way is inconsistent with the bus having previously moved over.

Devlin made it clear that he was probably out further than he had to be to clear petitioner (R. 57, 59), and when asked whether she was actually in the path of the bus, he answered categorically that his bus coming up in the general direction would not have hit her (R. 69).

In the face of this direct testimony, any argument based upon generalities at other times and distortions of the record is pointless.

(c)

Again, it is apparently argued that the jury could have found petitioner did not suddenly dart out in front of the bus, but that she was out crossing the street when the light

changed against her, and that the bus nevertheless came heedlessly on and struck her as, at the last moment, it swerved to the left to go around her (P. 13, 14). Counsel claims (P. 14) the operator was "significantly silent" as to when the lights turned green for the bus, that the story of the operator to the policeman that "she was crossing Lexington Avenue" was far removed from the driver's testimony that petitioner darted out in front of him when he was on top of her, and that the location of the body about at the center line supports this conclusion since the bus on striking the petitioner would have thrown her easterly and back toward the sidewalk.

Counsel forgets that the burden of proof was upon the plaintiff, not the defendants, and that Devlin was plaintiff's witness. If there was no answer with respect to when the lights turned green for the bus, there was likewise no question. Furthermore, what counsel means is that the witness did not testify at the trial as to when the lights turned green. Counsel for petitioner has in his possession, and used as the basis of his examination of Devlin at the trial, the sworn examination before trial of Devlin, which made it abundantly clear when the lights turned green for north-south traffic. Respondents consent to petitioner's counsel's use of such sworn testimony on this petition if he so chooses.

The fact that the police officer testified he was told petitioner was crossing from east to west proves nothing (not being evidence in chief) and in no way impeaches the operator's testimony that petitioner darted out, since the officer admitted he could not remember what the operator had told him (R. 34, 35).

Petitioner's claim that a body struck by a bus on the westerly half of the street would have been propelled in an easterly direction is completely contrary to physical laws. The actual direction which a body would take would be a resultant of the forces and directions involved. Petitioner was darting west and the bus had veered northwest. Con-

sequently, petitioner would have been propelled in a direction between northwest and north, and could not possibly have been thrown easterly.

What counsel really is suggesting is that the jury, without proof as to certain facts and because it disbelieved testimony as to other facts, could nevertheless speculate and find that the unproven facts and the opposite of the disbelieved facts were true. This, of course, is completely absurd. See the detailed discussion of this matter in subdivision 5 of this point, pages 18-20, *infra*.

3.

Even if some evidence of negligence on the part of the defendants did appear (a fact which we most strongly dispute and deny), there is still no evidence at all to show that the plaintiff was free from contributory negligence. Contrariwise, all the evidence shows that the plaintiff was guilty of contributory negligence as a matter of law.

The testimony is undisputed that the plaintiff suddenly darted out in front of the bus when the bus was only 10 feet away. It is too clear to be debatable that this was negligence of the grossest sort. If the plaintitff entered upon the path of the bus without looking she was completely oblivious of her duties. If she looked and saw and still placed herself in the position of danger she was, if anything, even more negligent, because then intention took the place of inadvertence.

4.

The petitioner is concluded by Devlin's testimony.

In calling him as a witness and relying on him to give evidence to establish her cause of action, the petitioner vouched for his reliability and credibility and could not say or show that he was unworthy of belief by impeach-

ing his credibility. All that she could do was to attempt by other evidence to contradict the facts testified to by him.

Hanrahan v. *New York Edison Company,* 238 N. Y. 194, 144 N. E. 499;
Carlisle v. *Norris,* 215 N. Y. 400, 109 N. E. 564;
Tryon v. *Willbank,* 234 App. Div. 335, 255 N. Y. Supp. 27.

However, since no other or contradicting evidence was offered, the petitioner is concluded by the testimony of Devlin, even though he is an adverse party to the action.

The applicable law is enunciated in *Hull* v. *Littauer,* 162 N. Y. 569, 57 N. E. 102, wherein the New York Court of Appeals said at pages 572 and 573:

"* * * Where, however, the evidence of a party to the action is not contradicted by direct evidence, nor by any legitimate inferences from the evidence, and it is not opposed to the probabilities; nor, in its nature, surprising, or suspicious, there is no reason for denying to it conclusiveness. * * * In *Lomer* v. *Meker* (25 N. Y. 361), where the defense to an action upon a promissory note was usury and the indorser gave the evidence to establish it, without contradiction, it was said that 'it was the duty of the court, in such case, to dismiss the complaint, or non-suit the plaintiff, or direct a verdict for the defendants. It is a mistake to suppose that, because the evidence came from the defendant, after the plaintiff had rested, the case must go to the jury. * * * The argument is, that this could not properly be done, because there was a question of credibility raised in respect to the witness Bock, who proved the usury. But this objection is untenable. The witness was not impeached or contradicted. His testimony is positive and direct, and not incredible upon its face. It was the duty of the court and jury to give credit to his testimony.' More recently, in

Kelly v. *Burroughs* (102 N. Y. 93), Judge Danforth, after observing that, as the facts were not disputed, there was no occasion to present them to the jury, said 'the mere fact that the plaintiff, who testified to important particulars, was interested was unimportant in view of the fact that there was no conflict in the evidence, or any thing or circumstance from which an inference against the fact testified to by him could be drawn.' "

The reasoning of the court fits perfectly the case at bar. Devlin was not contradicted in any way at all, either by direct evidence or by any legitimate inferences from his testimony; and his story was not opposed to the probabilities, since it is a fact well known to the courts of New York and elsewhere that some persons either deliberately or heedlessly do run in front of moving vehicles.

Necessarily, therefore, the plaintiff was bound by the operator's testimony, which exculpates the defendants completely from any charge of negligence and brands the plaintiff with affirmative negligence of the grossest sort.

5.

Even if petitioner were not bound by Devlin's testimony, she could not recover.

Devlin's testimony is the plaintiff's entire case as to the issue of liability. If his testimony is rejected and not believed, there is no proof of anything to support a recovery.

A finding of facts must be based upon evidence. It is always the obligation of the plaintiff to establish by affirmative evidence a *prima facie* case.

> *Galbraith* v. *Busch*, 267 N. Y. 230, 196 N. E. 36;
> *Epstein* v. *Cohen*, 288 N. Y. 307, 43 N. E. 2d 56.

Disbelief in Devlin's testimony is not sufficient to establish its opposite; rejection of it does not give a jury free-

dom to conclude that something different was the fact merely by reason of the doubt.

Miller v. *Smith*, 20 App. Div. 507, 47 N. Y. Supp. 49;
Williams v. *Van Norden Trust Company*, 104 App. Div. 251, 93 N. Y. Supp. 821;
Matter of Laurence v. *Gaffney*, 272 App. Div. 609, 74 N. Y. Supp. 2d 717.

Consequently, the rejection of the bus operator's testimony would leave a vacuum within the proof and mandate dismissal of the complaint.

It is interesting to note that plaintiff's attorney blandly proceeded and still proceeds on the assumption that the plaintiff could recover solely because the bus operator was not to be believed. Both during the trial (R. 40) and not less than eight times during his summation he cast aspersions on Devlin's truthfulness and invited the jury to reject his testimony. He stated that Devlin's narrative was "mallarkey" and not to be swallowed (R. 180); that it was a "poppy-cock" story (R. 185) with something "fishy" about it (R. 184); that it had to be dragged out of him (R. 181, 182) [as if this were not the tactic deliberately employed]; and that his answers were "wish washy" (R. 182) and "evasive" (R. 183).

Not only was this tactic by trial counsel of long experience completely improper, for as the New York Court of Appeals said in *Carlisle* v. *Norris*, *supra*, at page 409:

> "* * * he could not give evidence to impeach him and of course if he could not give evidence to impeach him he could not assert without evidence that he was not to be believed.",

but it overlooked the obvious fact that rejection of Devlin's testimony left a complete void in the proof, which could not be filled by sheer speculation on the part of the jury.

It is submitted as a most basic proposition of law that a plaintiff cannot recover on the theory that her whole case as presented is not to be believed.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the Court of Appeals of the State of New York should be denied.

Respectfully submitted,

STUART RIEDEL,
Counsel for Respondents,
116 West 32nd Street,
New York, New York 10001.